

Serial number: 10/579,842  
First Applicant: Virginia Ruth Pinney  
Examiner: Catheryne Chen  
Response to Office Action dated August 24, 2007

Filing date: May 17, 2006  
Attorney Docket: 31923  
Group Art Unit: 1655

### **REMARKS**

Reconsideration of the above-identified patent application in view of the following amendments and remarks is respectfully requested.

Claims 1, 3, 4, 6, 13, 18, 23, 27-29, 43, 45, 46, 49, 50, 53, 59, 68, 75, 80, 84, 88, 103, 105, 116, 155-164 are pending in this application. Claims 2, 5, 7-12, 14-17, 19-22, 24-26, 30-42, 44, 47-48, 51-52, 54-58, 60-67, 69-74, 76-79, 81-83, 85-87, 89-102, 104, 106-113, 115, 117-125, 127-131, 133, 139, 145, 147-148, 150-152, 154 have been canceled. Claims 114, 126, 132, 134-138, 140-144, 146, 149, 153 have been withdrawn from consideration. Claims 6, 13, 18, 23, 27, 28, 29, 43, 45, 46, 49, 50 and 53 have been objected to. Claims 1, 103 and 116 have been rejected under 35 U.S.C. §102. Claims 1, 4, 6, 13, 18, 23, 27, 28, 29, 43, 45, 46, 49, 50, 53, 59, 68, 75, 80, 84, 88, 103, 115, 116, 156, 157, 158 have been rejected under 35 U.S.C. §103. Claims 1, 3, 4, 6, 13, 18, 23, 27, 28, 43, 45, 50, 53 have been amended. Claims 160-164 are added herewith.

### **Amendments**

Claim 1 has been amended by including the feature from claim 2 that "... *three plant extracts are selected from the group consisting of frankincense, extract of roses, extract of Cananga, extract of Piper, and extract of Bursera*". Support for this amendment is found on page 4 line 1 of the specification. Consequently, claim 2 has been canceled.

Claims 3, 4, 6, 13, 18, 23, 27, 28, 43, 45, 50 and 53 have been amended to depend from claim 1.

### **New Claims**

Applicant has added new claim 160 dependent from claim 159. New claim 160 adds the feature that the composition of claim 159 comprises at least four different plant extracts.

Applicant has also added new claim 161 dependent from claim 159. New claim 161 adds the feature that the composition of claim 159 comprises at least four different plant extracts.

Applicant has also added new claim 162 dependent from claim 1, new claim 163 dependent from claim 59 and new claim 164 dependent from claim 159. The new

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claims add the limitation that the extract of *Piper* is an extract of *Piper auritum* as supported, for example, on page 7 line 15 of the specification.

### **Election**

In response to the Restriction Requirement of May 7, 2007, Applicant elected Group I, claims 1-4, 6, 13, 18, 23, 27-29, 43, 45-46, 49-50, 53, 59, 68, 75, 80, 84, 88, 103, 105, 114, 116, 126 and 155-159.

In the Restriction Requirement, Applicant was asked to select a combination of plant extracts from those listed in claims 2, 3, 4 and 159. Applicant selected "frankincense, extract of roses, extract of *Cananga*, extract of *Piper*, and extract of *Bursera*" and noted that all claims are readable on this combination. In the Office Action, it is mistakenly stated that claims 2, 3 and 159 are withdrawn as being drawn to a non-selected group or species.

In the Restriction Requirement, Applicant was asked to select a specific carrier from claims 105, 114, 116 and 126. Applicant selected claim 116 "viscous fluid" and noted that claim 105 is readable on this species. In the Office Action, it is mistakenly stated that claim 105 is withdrawn as being drawn to a non-selected group or species.

Applicants submit that claim 132 and the claims dependent on claim 132 should be rejoined after the allowance of claim 1.

### **Claim Objections**

Claims 6, 13, 18, 23, 27, 28, 29, 43, 45, 46, 49, 50 and 53 are objected to because they depend on Claim 2. This objection apparently arose from the mistaken assumption that claim 2 had been withdrawn. That said, amendment of these claims to depend from claim 1 as suggested by the Examiner renders the objection moot.

### **Summary of the Response**

#### **The claims**

The claims currently before the Examiner (including independent claims 1, 59, 103 and 159) relate to compositions comprising a combination of at least three plant extracts from a group of five plant extracts (frankincense, extract of roses, as, extract of *Cananga*, extract of *Piper* and extract of *Bursera*). The claims therefore encompass a total of only 20 possible combinations of the five different plant extracts.

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It has been demonstrated (see Experimental section of the specification) that some embodiments of the composition are effective in altering the perception of at least one malodor.

#### The art

The rejections of the claims are based on art that mentions at least three of the five plant extracts. However in every case, the plant extracts of the claims are buried in a very long list of other plant extracts. Kureha (JP 04149135) mentions two of the five extracts in a list of 25 extracts and three of the five extracts in a list of 19 other extracts. There are nearly 20000 combinations of three plant extracts where one or two are taken from the list of 25 and one or two are taken from the list of 19. In other art, the five extracts are mentioned in a list of more than 100 extracts. For example, Lambrecht (US 2001/00057111) mentions the five extracts in a list of more than 150 plant extracts together with many hundreds of other fragrances. There are more than 3.3 million combinations of three plant extracts from a list of 150.

In not one of the cited art is there any indication that a combination of any three of any of the five plant extracts might have any particular advantageous property. A person having ordinary skill in the art not having a specific motivation would have no reason to select any of the cited art for a list of plant extracts. It is more likely that such a person would consult any other random list, for example a product catalog, that may or may not include the five plant extracts of the claims and would most likely be significantly longer than that of Kureha.

#### Anticipation under 35 USC 102(b)

*"In order to anticipate the claims, the claimed subject matter must be disclosed in the reference with 'sufficient specificity to constitute an anticipation under the statute.'...If the claims are directed to a narrow range and the reference teaches a broad range...it may be reasonable to conclude that the narrow range is not disclosed with 'sufficient specificity' to constitute an anticipation of the claims"* (MPEP 2131.03 III).

In *Atofina v. Great Lakes Chem. Corp* 441 F.3d 991, 999, 78 USPQ2d 1417, 1423 (Fed. Cir. 2006) the court held that a reference temperature range of 100 to 500 degrees did not describe a claimed range of 330-450 degrees with sufficient specificity

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to be anticipatory. If 30% of the range (120/400 as in Atofina) is not anticipatory then neither 0.1% (20 combinations of the claims vs. 20000 combinations of Kureha) nor  $6 \times 10^{-4}$  % (claimed combination vs. at least 3.3 million combinations of Lambrecht *et al.*) is anticipatory.

### Obviousness

With regards to obviousness, Applicant respectfully asserts that no *prima facie* case for obviousness of the claims in light of the cited art has been made.

*"The fact that a claimed species or subgenus is encompasses by a prior art genus is not sufficient by itself to establish a prima facie case of obviousness"* (MPEP 2144.08 II)

Initially, the scope and content of the relevant prior art should be determined (MPEP 2144.08 II.A.1). Doing such a determination, it is seen that: A) the disclosed art is of a random list of plant extracts; B) the disclosed properties of all plant extracts and disclosed combinations relate to scents or aromatherapy; C) it is known that plant extracts can often be combined; D) there is a very large number of combinations encompassed by the cited art, even when taking only some of the variables in consideration.

Subsequent to such determination, it is necessary to determine the similarities and differences between the closest disclosed combination and the claims (MPEP 2144.08 II.A.2). Such determination has not been made explicit in the Office Action, but Applicant's review shows that no disclosed combination has any relation to the claims.

Subsequently, the level of skill in the Art must be determined and then it must be determined whether one of ordinary skill in the art would have been motivated to select the claimed species. (MPEP 2144.08 II.A.4).

Such determination includes consideration of the number of disclosed combinations (MPEP 2144.08 II.A.4(a)). Applicant asserts that the large number of theoretically disclosed combinations (at least about 20000) compared to the small number of claimed combinations (20, that is 0.1%) does not support a finding of obviousness.

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Such determination also includes consideration of the teachings of similar properties or uses (MPEP 2144.08 II.A.4(d)). The cited art teaches no similar properties or uses.

Further, *"Any evidence of unexpected results within the narrow range may also render the claims unobvious"* (MPEP 2131.03 III) and the presence of an unexpected property is evidence of nonobviousness (MPEP 716.02(a)(III)). None of the prior hints or suggests that any combination of the five plant extracts might have any particular advantageous property, much less the unexpected property that relates to malodor perception, as has been demonstrated in the experimental section.

In *KSR International Co. v. Teleflex Inc. et al* (No. 04-1350) the Supreme Court of the United States instructs that non-obviousness can be determined if an improvement is more than the predictable use of prior-art elements according to an established function. Not one of the cited art discloses that any combination of plant extracts has an established function relating to malodor perception, thus selecting a small number of combinations from a much larger group of combinations as done in the claims is more than a predictable use of prior-art elements.

Further, the Supreme Court notes that *"it can be important to identify a reason that would have prompted a person of ordinary skill in the art to combine the elements as the new invention does"*. The cited art as well as the Office Action are silent as to any reason that would prompt a person of ordinary skill in the art to combine plant extracts to make the claimed combinations.

Further, the Supreme Court notes that in *United States v. Adams* 383 U.S. 39, 40 (1966) *"The fact that the elements worked together in an unexpected and fruitful manner supported the conclusion that Adam's design was not obvious to those skilled in the art"*. As noted above, it has been experimentally demonstrated that the claimed combinations work together in an unexpected and fruitful manner.

### **35 U.S.C. §102(b) Rejection: Kureha (JP 04149135)**

Claims 1, 103 and 116 stand rejected under 35 USC 102(b) as being anticipated by Kureha.

Kureha teaches fragrance compositions that are either invigorating or increase the appetite comprising: a) a first, physiologically active, oil (19 oils explicitly listed);

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and b) a second oil that **enhances** the physiological activity of the first oil, the second oil selected from a list of 25 specific oils.

Kureha fails to teach the feature of claims 1, 103 and 159 of a composition that comprises a combination of at least three plant extracts from the group consisting of Frankincense, Roses, *Cananga*, *Piper*, and *Bursera*.

On page 3 of the Office Action is stated that Kureha teaches a perfume composition comprising boswellia, ylang ylang, black pepper, burseracea and rose. This statement is incorrect as Kureha does not teach such a composition.

Kureha lists two of the five plant extracts, (Ylang Ylang (an extract of *Cananga*) and Frankincense) as belonging to the group of 25 enhancing oils. Kureha lists one of the five plant extracts, Pepper oil (*Piper nigrum*, an extract of *Piper*) as belonging to the first group of 19 oils as having an appetite stimulating physiological effect. Kureha lists one of the five plant extracts, Rose oil (an extract of roses) as belonging to the first group of 19 oils as having an invigorating physiological effect.

Kureha lists the five plant extracts of claims 1, 103 and 159 buried in a much longer list of plant extracts and provides no guidance for combining any three extracts from the five plant extracts of the claims from amongst the effectively infinite number of combinations (nearly 20000) of 25 enhancing extracts and 19 physiological extracts disclosed.

Kureha does not disclose the claimed compositions with sufficient specificity to be anticipatory. Thus, Applicant respectfully submits that Kureha does not anticipate claims 1, 103 and 159.

**35 U.S.C. §102(b) Rejection: Lambrecht *et al.* (US 2001/0005711)**

Claims 1, 103 and 116 stand rejected under 35 USC 102(b) as being anticipated by Lambrecht *et al.*

Lambrecht *et al.* teaches a perfume composition that has intensified smell, higher color stability, long lastingness, freshness boosting and harmonization.

Lambrecht *et al.* also fails to teach the feature of claims 1, 103 and 159 of a composition that comprises a combination of at least three plant extracts from the group consisting of Frankincense, Roses, *Cananga*, *Piper*, and *Bursera*.

Lambrecht *et al.* mentions five plant extracts of claims 1, 103 and 159 (cananga oil, linaloe oil, pepper oil (*Piper nigrum*), ylang oil (presumably ylang ylang)

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and rose oil) buried in a list of more than 150 plant extracts in paragraph 13 together with a few hundreds of other fragrances.

Lambrecht *et al.* lists the five plant extracts of claims 1, 103 and 159 buried in a much longer list of plant extracts and provides no guidance for combining any three extracts from the five plant extracts of the claims from amongst the effectively infinite number of combinations (more than 3.3 million) of 150 extracts disclosed.

Lambrecht *et al.* does not disclose the claimed compositions with sufficient specificity to be anticipatory. Thus, Applicant respectfully submits that Lambrecht *et al.* does not anticipate all of the features of claims 1, 103 and 159.

**35 U.S.C. §103(a) Rejections: Sott (U.S. 2002/0081341)**

Claims 1, 4, 6, 13, 18, 23, 27, 59, 68, 75, 80, 84, 88, 103 and 116 stand rejected under 35 USC 103(a) as being unpatentable over Sott. To be rejected under 35 USC 103(a), all claim elements must be taught by the cited art.

Sott teaches a general method for formulating an individualized essential oil composition.

Sott fails to teach the feature of claims 1, 103 and 159 of a composition that comprises a combination of at least three plant extracts from the group consisting of Frankincense, Roses, *Cananga*, *Piper*, and *Bursera*.

On page 4 of the Office Action is stated that Sott teaches an essential oil formulation comprising black pepper, Frankincense oils, *Bursera Delpechina*, Rose Otto and Ylang Ylang. This statement is incorrect as Sott does not teach such a composition.

Sott mentions five plant extracts of claims 1, 103 and 159 buried in a list of more than 100 plant extracts starting paragraph 48. Sott does not teach the combination of three of the extracts from the five plant extracts of the claims from amongst the effectively infinite number of combinations of more than 100 extracts.

Sott provides no guidance for combining three extracts from the five plant extracts of the claims from amongst the effectively infinite number of combinations of more than 100 extracts disclosed. Sott lists the five plant extracts of claims 1, 103 and 159 buried in a much larger list of plant extracts and does not provide any indication that the five plant extracts of the claims can be expected to have any special properties when three or more are combined to make a composition.

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On page 4 of the Office Action is also stated that Sott does not teach the relative amounts of the different plant extracts as claimed and that Applicant has not presented unexpected results of the claimed compositions. Applicants comments relating to these statements are found below in the section labeled "Incorrect Assertions in the Office Action".

Thus, Applicant respectfully submits that no rationale has been provided for modifying the cited art to read on claims 1, 103 or 159, and no *prima facie* case of obviousness has been set forth in the Office Action.

**35 U.S.C. §103(a) Rejections: Sott in view of Lambrecht *et al.***

Claims 1, 4, 6, 13, 18, 23, 27, 28, 29, 45, 49, 59, 68, 75, 80, 84, 88, 115, 116 and 157 stand rejected under 35 USC 103(a) as being unpatentable over Sott in view of Lambrecht. To be rejected under 35 USC 103(a), all claim elements must be taught by the cited art.

As discussed above, neither Sott nor Lambrecht teach the specific combination of three of the five plant extracts of the claims. Even in combination, Sott and Lambrecht together do not teach the claimed combination.

On page 5 of the Office Action is stated that Sott teaches an essential oil formulation comprising black pepper, Frankincense oils, Bursera Delpechina, Rose Otto and Ylang Ylang. This statement is incorrect as Sott does not teach such a composition.

On page 5 of the Office Action is stated that "[the reference] *does not teach the claimed concentrations and vanillin*". On page 5 of the Office Action is stated that "*the reference also does not specifically teach combining Frankincense, Rose, Cananga, Piper, Bursera and vanillin together*". The references not only do not specifically teach the claimed concentrations and vanillin, but also does not teach the claimed combination of three from the list of five plant extracts.

On page 5 of the Office Action is stated that "*it is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose...the idea of combining them flows logically from their having been individually taught in the prior art. Thus, it would be obvious to combine all of the claimed ingredients because they are taught in the reference to have the same*



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*purpose*". The conclusion of this statement is incorrect. Since neither of the cited art has the same purpose, it is not obvious to combine this art.

The purpose of Sott is to provide a method for personalizing a combination of essential oils for aromatherapy for a specific person and teaches no specific composition, the personalization based on known aromatherapeutic properties of the oils. The purpose of Lambrecht *et al.* is to provide a perfume composition for industry (not people, not aromatherapy) having improved properties. These unrelated purposes have nothing to do with the claims, which in embodiments relates to altering the perception of malodor.

Thus, Applicant respectfully submits that no rationale has been provided for modifying the cited art to read on claims 1, 103 or 159, and no *prima facie* case of obviousness has been set forth in the Office Action.

**35 U.S.C. §103(a) Rejection: Conklin *et al.* (U.S. 6,444,253)**

Claims 1, 6, 13, 18, 23, 45, 46, 49, 103, 116 and 157 stand rejected under 35 USC 103(a) as being unpatentable over Conklin *et al.*

To be rejected under 35 USC 103(a), all claim elements must be taught by the cited art.

Conklin *et al.* fails to teach the feature of claims 1, 103 and 159 of a composition that comprises a combination of at least three plant extracts from the group consisting of Frankincense, Roses, *Cananga*, *Piper*, and *Bursera*.

On page 6 of the Office Action is stated that Conklin teaches an essential oil formulation comprising Frankincense, Piper cubeba, Rose Otto, Ylang Ylang and acetaldehyde. This statement is incorrect as Conklin *et al.* does not teach such a composition.

Conklin mentions four of the five plant extracts of claims 1, 103 and 159 buried in a list of more than 100 plant extracts starting column 4. Conklin *et al.* does not teach the combination of three of the extracts from the five plant extracts of the claims from amongst the effectively infinite number of combinations of more than 100 extracts.

Thus, Applicant respectfully submits that no rationale has been provided for modifying the cited art to read on claims 1, 103 or 159, and no *prima facie* case of obviousness has been set forth in the Office Action.

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**35 U.S.C. §103(a) Rejection: Bramwell et al. (U.S. 3,884,842) in view of Sott**

Claims 1, 4, 6, 13, 18, 23, 27, 43, 45, 49, 50, 53, 59, 68, 75, 80, 84, 88, 103, 116, 156, 157, and 158 stand rejected under 35 USC 103(a) as being unpatentable over Bramwell et al. in view of Sott. To be rejected under 35 USC 103(a), all claim elements must be taught by the cited art.

On page 7 of the Office Action is stated that Bramwell et al. was applied to claims 1, 4, 6, 13, 18, 23, 27, 59, 68, 75, 80, 84, 88, 103 and 116. Applicant has not found a previous discussion of the relevance of Bramwell et al. to the claims in the Office Action.

From the five plant extracts of the claims, Bramwell et al. mentions a combination of at most two extracts: Ylang oil and Rose base in Examples 1 and 2. In Example 4, Bramwell et al. mentions Rose Otto. Bramwell et al. does not mention any expected special effect or advantage to any combination of extracts beyond a pleasing smell.

As discussed above, Sott does not teach the specific combination of three of the five plant extracts of the claims. Further, Sott and Branwell in combination also do not teach the specific combination of three of the five plant extracts of the claims.

On page 7 of the Office Action is stated that Sott teaches an essential oil formulation comprising black pepper, Frankincense oils, Bursera Delpechina, Rose Otto and Ylang Ylang. This statement is incorrect as Sott does not teach such a composition.

On page 8 of the Office Action is stated that "[the reference] *does not teach the claimed concentrations and benzyl benzoate and amyl salicylate*". On page 8 of the Office Action is stated that "*the reference also does not specifically teach combining the claimed ingredients together*". The references not only do not specifically teach the claimed concentrations and benzyl benzoate and amyl salicylate, but also do not teach the claimed combination of three from the list of five plant extracts.

On page 5 of the Office Action is stated that "*it is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose...the idea of combining them flows logically from their having been individually taught in the prior art. Thus, it would be obvious to combine all of the*

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*claimed ingredients because they are taught in the reference to have the same purpose". The conclusion of this statement is incorrect: since neither of the cited art has the same purpose, it is not obvious to combine this art.*

The purpose of Sott is to provide a method for personalizing a combination of essential oils for aromatherapy for a specific person and teaches no specific composition, the personalization based on known aromatherapeutic properties of the oils. The purpose of Bramwell is to provide attractive-smelling perfumes.

Thus, Applicant respectfully submits that no rationale has been provided for modifying the cited art to read on claims 1, 103 or 159, and no *prima facie* case of obviousness has been set forth in the Office Action.

#### **Incorrect Assertions in the Office Action**

A number of apparently inadvertent incorrect assertions are found in the Office Action. Applicant respectfully corrects these incorrect assertions.

On pages 3 (twice), 4, 5, 6 and 8 of the Office Action is noted as fact without any evidentiary support and without an explanation what the relevance of these statements is to the examination of the claims that "*Oils are viscous and serve as carriers in pharmaceutical compounds*". It may be that some oils might be found in a variety of viscosities ranging from very fluid to very viscous. Further, it may be that some oils may serve as carriers in pharmaceutical compositions, but other oils are highly toxic and are unsuitable to serve as carriers in pharmaceutical compositions.

Applicant respectfully requests that the relevance of these statements be explained and be accompanied by any necessary evidentiary support.

On pages 4, 5 and 8 of the Office Action is stated that "*the reference also does not specifically teach adding the ingredients in the amounts claimed by Applicant*" and on page 7 is stated that "*it does not teach the concentrations*". The references not only do not specifically teach the amounts/concentrations of the ingredients, but also do not teach the claimed combination of three from the list of five ingredients.

On pages 4, 6, 7 and 8 of the Office Action appears the conclusory statement that "*The amount of a specific ingredient in a composition is clearly a result effective*

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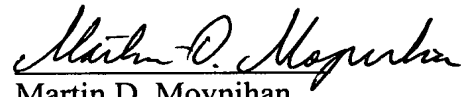
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*parameter that a person of ordinary skill in the art would routinely optimize". In not one of the cited art is a combination of three of the five extracts listed in the claims taught, hinted at or disclosed, and even less any potential utility or special properties of such a combination, for example in "altering the perception of a malodor" of embodiments of the invention. This conclusory statement implies that combining three specific extracts from a much longer list of extracts without even knowing what useful effect might be achieved is not inventive and consists of routine experimentation. Such a statement is completely at odds with the directives issued by the Supreme Court of the United States in KSR International Co v Teleflex Inc.*

On pages 5, 6, 7 and 8 of the Office Action appears the statement that "*absent some demonstration of unexpected results from the claimed parameters, this optimization of ingredient amount would have been obvious at the time of the Applicant's invention*". Applicant respectfully notes that, inter alia, in the Experimental section is demonstrated an unexpected result of at least one embodiment of the claimed invention.

In view of the above remarks and amendments it is respectfully submitted that all claims are now in condition for allowance. A prompt notice of allowance is respectfully and earnestly solicited.

Respectfully submitted,

  
Martin D. Moynihan  
Registration No. 40,338

Date: December 4, 2007

**Enclosures:**

- Petition for Extension (1 Month)
- Additional Claims Transmittal Fee